

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE ELSBERRY,

Defendant-Appellant.

UNPUBLISHED

July 9, 2013

No. 308523

Wayne Circuit Court

LC No. 11-005281-FH

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with the intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to two years' probation for his convictions and now appeals by right. We affirm.

I. DEFENDANT'S MOTION FOR MISTRIAL

Defendant first argues that the trial court erred by declining to grant defendant's motion for a mistrial after Officer Carmen Diaz, one of the officers involved in the search and seizure leading to defendant's arrest, testified that defendant was on federal probation and had previously been in jail. We agree that Officer Diaz's conduct at trial was an improper attempt to prejudice the proceedings. However, we cannot conclude that Officer Diaz's conduct requires reversal.

This Court "review[s] for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). An abuse of discretion occurs when the trial court's decision results in an outcome which falls outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231; 236; 791 NW2d 743 (2010). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (citation and quotation marks omitted). In addition, a mistrial should be granted only "when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). "Defendant was entitled to a fair trial, not a perfect one." *Id.* However, even if this Court concludes that the trial court abused its discretion in denying a motion for mistrial, "[e]rror requiring reversal results

only where a trial judge's denial of a defendant's motion for mistrial is so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice.” *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983); see also *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (preserved, nonconstitutional errors only reversible if “it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice”).

This Court has recognized that “prosecutors and police witnesses have a special obligation not to venture into forbidden areas of testimony which may prejudice the defense.” *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978). This Court distinguishes between “isolated or inadvertent” references to improper information and “deliberate and repeated efforts” to interject prejudicial testimony. See *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).

In this case, the trial testimony occurred as follows:

OFFICER DIAZ: [Defendant], after being given his constitutional rights, gave a verbal statement that they were factitious [sic]. He is on federal probation and he wanted to make sure that --

MS. BEGININ: Objection. May we approach, Your Honor.

THE COURT: Sure, come on up. What was the nature of your objection?

After a bench conference, the trial court struck the testimony and stated the following:

THE COURT: Okay. I will strike the testimony from Officer Diaz from the record regarding that the defendant was on Federal Probation, and instruct the jury to disregard the testimony for the purposes of the evidence that has been presented in this case. Go ahead, please.

Later, defense counsel objected to Officer Diaz’s reference to defendant’s prior jail time, and the trial court sustained the objection and struck the answer. The testimony occurred as follows:

OFFICER DIAZ: Based on a statement that [defendant] gave me, he said Beonka was a person that was helping him once he got out of jail.

MR. BEGININ: Your Honor--

THE COURT: Come up.

The trial court then excused the Jury. Outside of the presence of the jury, defense counsel, Marc Beginin, moved for a mistrial:

MR. BEGININ: Defense moves for a mistrial. The first statement, there is nothing that the defense did to elicit the testimony of the prior convictions or prison or anything. The first time, there should have been a corrective instruction.

The witness should have been instructed not to mention these types of things. I understand there are other ways to get it in. Twice, and now she said [defendant] was in jail. Defense moves for a mistrial.

THE COURT: Okay. I am not going to grant the Motion for Mistrial. I will give another corrective instruction for the jury. I don't want to have testimony regarding [defendant's] prior convictions or the fact that he was in jail or the fact that he was on probation whether or not it is admissible. Otherwise, I don't want it to be discussed; okay?

* * *

MS. CEZIN: Verneisha Cezin on behalf of the People. This testimony that the officer testified to at the Preliminary Examination which was not objected to. We would put it forth at this time. I do understand the Court's instruction, which we will abide by now. I am just making a record, I believe the argument is that this was at his residence. This shows why a utility bill or things of that nature would not be in his name, straw person, essentially to put things in order—

THE COURT: If she can limit her testimony to simply that, that he was not able to – I know that the jury may have question in their mind in terms of the reason why he wasn't able to.

My ruling is it is unduly prejudicial under the circumstance. The other thing with respect to the Preliminary Examination, this is with respect to the Preliminary Examination, this is with the Jury here, so the Motion for Mistrial is denied. The basis for the denial of the Motion for Mistrial, is because I don't think it is of a sufficient—I don't think it is sufficiently prejudicial so that there is no possibility that the Jury will be able to disregard that small portion of what was said by Officer Diaz in evaluating the evidence, and making the determination on the evidence that has been admitted.

The trial court then gave the following instruction:

THE COURT: There has been a couple of things that have been said by this witness recently. I have already instructed you that the first thing regarding the federal probation is to be—is not admissible, and you are not to consider that as part of the evidence that I presented in this case. Also, the testimony from Officer Diaz that was just made regarding when she was testifying about the utility bill and why it was in the person's name. There was testimony about the defendant having been in jail. That is also stricken from the record. You are not to consider that. The reason we do that is that we want you to make a decision based on the evidence in this case, not upon extraneous things that might be unduly prejudicial. Okay. That is why I am excluding that. I want you to strike that from your deliberations. Just make your decision on the basis of the evidence I have admitted. I have excluded that particular testimony; okay.

Indeed, the record reflects that during examination by the prosecutor, Officer Diaz stated that “[defendant] is on federal probation” After a curative instruction by the trial court, Officer Diaz *again* injected nonresponsive testimony that defendant had been in jail, which required a second curative instruction from the court. Then, at the end of direct examination, Officer Diaz opined that the defendant was “an upper level narcotics trafficker.”

The record suggests a deliberate attempt by Officer Diaz to subvert fair-trial safeguards and contaminate the proceedings with prejudicial testimony. However, we are bound to apply the harmless-error analysis established by the Michigan Supreme Court. See *Lukity*, 460 Mich at 495. Under that standard, we can find no reasonable basis for reversal of defendant’s convictions. Given the extensive curative instructions given by the trial court, see *Abraham*, 256 Mich App at 279, and in light of the overwhelming evidence of defendant’s guilt, there are no grounds for granting appellate relief.

II. FAIR TRIAL

Defendant also argues that Officer Diaz’s inadmissible opinion testimony that defendant was an “upper level narcotics trafficker” deprived him of his constitutional right to a fair trial. We disagree.

Defendant failed to object to Officer Diaz’s characterization of his alleged drug activity. Accordingly, this issue is unpreserved, and therefore defendant bears the burden to establish that the admission of this testimony amounted to plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must show that “1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* (citations omitted). Moreover, even if defendant meets this burden, this Court still has “discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Id.* at 763-764 (citation omitted).

“Drug profile evidence has been described as an informal compilation of characteristics often displayed by those trafficking in drugs.” *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999) (citation and quotation marks omitted). In *Murray*, this Court explained that “the majority of courts have held that drug profile evidence is inadmissible as substantive evidence of guilt, because proof of crime based wholly or mainly on these innocuous characteristics could potentially convict innocent people.” *Id.* at 53. However, courts have generally “allowed expert testimony to explain the significance of items seized and the circumstances obtained during the investigation of criminal activity.” *Id.* In such circumstances, “the expert may not move beyond an explanation of the typical characteristics of drug dealing- in an effort to provide context for the jury in assessing an alleged episode of drug dealing- and opine that the defendant is guilty merely because he fits the drug profile.” *Id.* at 54.

This Court set forth a four-prong test to help to determine the admissibility of such evidence. “First, the reason given and accepted for the admission of the profile testimony must only be for a proper use- to assist the jury as background or modus operandi explanation. *Id.* at 56. Second, “the profile, without more, should not normally enable a jury to infer defendant’s guilt. The prosecutor must introduce and argue some additional evidence from the case that the jury can use to draw an inference of criminality.” *Id.* at 57. Third, “it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony.” *Id.* “Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant’s characteristics to the profile in such a way that guilty is necessarily implied.” *Id.*

At the end of her direct examination by the prosecutor, Melissa Seaman, Officer Diaz was allowed to offer the following characterization without objection from defense counsel:

MS. SEAMAN: Officer Diaz, as we went through a lot of things this afternoon, the evidence that you saw and collected there, what does that indicate to you based upon all of your years of training and experience?

OFFICER DIAZ: That the defendant at this time, Mr. Robert Elsberry wasn’t just a regular nickel and dime guy selling narcotics on the street corner. He was an upper level narcotics trafficker.

First, defendant argues that the trial court’s failure to instruct the jury regarding the proper and limited use of profile testimony requires reversal. “However, in the absence of a request or objection, the appellate courts have declined to impose a duty on trial courts to give sua sponte limiting instructions such as the one now suggested by defendant, even if such an instruction should have been given.” *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Accordingly, defendant has not shown that the trial court’s failure to issue a sua sponte limiting instruction was plain error.

Defendant also claims that the expert witness should not have expressed her opinion, based on a profile, that defendant is guilty, nor should she should have expressly compared defendant’s characteristics to the profile in such a way that guilt is necessarily implied. However, even assuming, arguendo, that the admission of this testimony was plain error under the four-part test articulated in *Murray*, 234 Mich App at 56-57, defendant cannot show that it affected his substantial rights; that is, defendant cannot show that the testimony’s admission “affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763. Indeed, there was ample evidence of defendant’s guilt other than the portion of Officer Diaz’s testimony about which defendant complains on appeal. First, Officer Diaz and Sergeant Myron Weathers testified that they observed defendant and Smith in the living room of the house as police entered 15513 Edgewood Circle. Officer Diaz and Officer Michael Bryant detained defendant and Smith while other officers continued to search the premises. Officer Diaz found \$4,473 and house keys to the front door in defendant’s pocket. Police Officers confiscated marijuana, heroin, cash, a digital scale, rubber gloves, and drug cutting agents in the search of 15513 Edgewood Circle.

There was sufficient evidence that defendant was involved in drug activity. Accordingly, defendant has failed to show that the testimony affected his substantial rights, even if it was erroneously admitted. *Id.*

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Patrick M. Meter